

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original + Affidavit of Mailing

77-1148

To be argued by
JONATHAN M. MARKS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1148

UNITED STATES OF AMERICA,

Appellee,

—against—

**WILLIAM JAMES MILLER and JAMES STANLEY
KORZENIEWSKI, JR.,**

Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

BRIEF FOR THE APPELLEE

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Eastern District of New York.*

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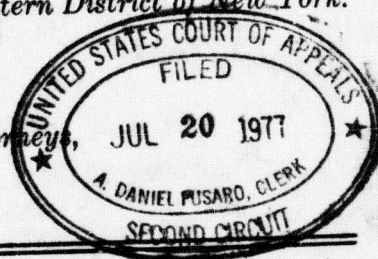


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Preliminary Statement

Appellants Miller and Korzeniewski appeal from judgments of conviction entered February 4, 1977, in the United States District Court for the Eastern District of New York (Costantino, J.) after a five-day trial by a jury, convicting them of conspiring to manufacture, distribute and possess phencyclidine, a Schedule III controlled substance, in violation of 21 U.S.C. § 846.¹ Both appellants are on bail pending this appeal.

¹ Miller was sentenced to two years imprisonment to serve two months, the balance suspended, plus five years probation under 18 U.S.C. § 5010(a) and a two year special parole term. Korzeniewski was sentenced to three years imprisonment, to serve two months, the balance on probation under § 5010(a) and a five year special parole term.

On appeal, both appellants claim that the district court committed error in (1) instructing, without objection, that an unlawful conspiracy existed and that the only question was whether the appellants were members of that conspiracy; (2) in permitting without objection, a government accomplice witness to testify in an Air Force uniform; (3) in allowing a chemist to testify as an expert witness that, in his opinion, an accomplice witness knew how to manufacture phencyclidine; and (4) in allowing co-conspirator statements to be admitted into evidence. In addition, appellant Korzeniewski claims that disparate sentences between appellants and others charged with the same offense violated the Sixth Amendment.²

Statement of Facts

A. The Government's Case

Robert Kuzniewski, who was awaiting sentencing on his plea of guilty to an indictment charging him with conspiring to manufacture and distribute phencyclidine, testified for the government³ (22).⁴ Mr. Kuzniewski, who was in the Air Force at the time of the trial, wore his Air Force uniform on the stand, without objection. He testified that while a student at Christ the King High School in Middle Village, Queens, and later at Queens College, he learned how to synthesize phencyclidine, a drug that is commonly known as "angel dust" or "PCP"

² Appellants were indicted with nine others, all of whom plead guilty.

³ Kuzniewski plead guilty to a separate indictment arising out of an earlier partnership he had with one John Kowalchek (55-56).

⁴ Page references without a prefix are to the transcript. "A." refers to appellants' Joint Appendix.

and is smoked in a cigarette made from mint leaves (27-29, 33).

During the summer of 1975, Kuzniewski entered into a partnership with Marek Janusz and Joseph Palminteri for the purpose of producing and distributing "angel dust" (35-36). At the end of July 1975, the appellant Miller, in the presence of a Robert Higgins, told Kuzniewski that he had bought a pound of "angel dust" from Janusz and wanted to know how to pour it on mint leaves. (A pound yields about 1,000 cigarettes and sold for between \$900 and \$1,000 (178, 36).) Miller, Higgins and Kuzniewski then went to Forest Park with Miller's PCP, and Kuzniewski showed Miller how to pour it on mint leaves (37-39). Sometime later, Kuzniewski saw Miller with 5 or 6 ounces of PCP and a double-beam scale in the back of his car (40).

Around November 1975, Kuzniewski approached the appellant James Korzeniewski and asked him when he could expect final payment for some "angel dust" that he had given Miller. Korzeniewski said that he would pay him in a week or two (42, 44). Shortly before that, Miller had told Kuzniewski that Miller and Korzeniewski were partners (40-41). In November or December, Korzeniewski admitted that he had "a whole bunch of little kids dealing" in "angel dust" and that Higgins was dealing "nickel bags" for him (45-46). Miller paid Kuzniewski a total of \$350 for "angel dust" on two occasions (46-47).

Joseph Palminteri, another co-conspirator who had plead guilty to conspiracy to manufacture and distribute phencyclidine, also testified. Palminteri met Miller and Korzeniewski in December 1975, in Greenpoint, Brooklyn, after Palminteri had formed his partnership with Kuzniewski and Marek Janusz (181-182). Miller told Palminteri, in Korzeniewski's presence, that he wanted to buy some PCP. Palminteri agreed to sell it to him (181-185). Miller said that Korzeniewski was his part-

ner (186). Palminteri and Kuzniewski told appellants that the price would be \$1,000 per pound (197). Janusz told Palminteri that he would be responsible for giving appellants the "angel dust" (188).

In the late summer of 1975, Miller told Palminteri that Kuzniewski had mixed a pound of "angel dust" for him (202). Miller also had some PCP, which he and Palminteri smoked (205).

In November 1975, the partnership (Kuzniewski, Palminteri and Janusz) made another batch of "angel dust" at the house of one Judd Lucas in upstate New York (215-216). Thereafter, while in Greenpoint, Miller expressed an interest in buying an additional two pounds of PCP. He said that he would be able to pay for it promptly "since the first pound went well during the summer." (216-218). After Palminteri agreed to sell appellants the two pounds, Korzeniewski gave Palminteri between two and three hundred dollars (217, 224-225).

A notebook which Palminteri used to record his PCP sales and receivables was admitted into evidence (439). The notebook contained the following relevant notations:

- 1 Billy owes 1000
- 2 Billy owes 2000

Palminteri explained that the notations referred to the number of pounds of PCP sold to and the amount of money owed by Billy Miller (440-443).

Jack Fasanello, a forensic chemist employed by the Drug Enforcement Administration, testified in answer to a hypothetical question summarizing the testimony of Robert Kuzniewski concerning the procedure he followed in synthesizing PCP that if the steps described in the testimony were followed phencyclidine would be synthesized (491-493). In addition, Mr. Fasanello testified that,

on the basis of his discussions with Kuzniewski, it was his opinion that Kuzniewski had "a very good working knowledge of the reactions" and could synthesize PCP (494).

Special Agent Barry Abbott of the Drug Enforcement Administration testified that, upon the execution of a search warrant at Joseph Palminteri's house, found a large quantity of chemicals, all of them PCP precursors, and the notebook which was received in evidence (506-508).

B. The Defense Case

Both appellants testified in their own behalf. Miller admitted knowing Kuzniewski and Palminteri (576-577). He denied ever possessing, purchasing or using PCP (583-585). He also denied ever paying any money to Kuzniewski, Palminteri or Janusz for "angel dust" (585). James Korzeniewski, also denied having ever possessed "angel dust" (615).

Appellant Miller called Robert Higgins. He testified that he knew that Robert Kuzniewski was manufacturing "angel dust" but that he never saw either of the appellants with "angel dust" in their possession (513-515). He denied ever going to Judd Lucas's house in Ellenville, New York, to manufacture "angel dust" (516). Appellant Miller also called James Gluck, a friend of his, who testified that he had no knowledge of Miller's possessing "angel dust" (561-562, 564).

C. Rebuttal

Judd Lucas was called as a rebuttal witness and he testified that in June 1975, Robert Higgins and Marek Janusz went to Lucas's parent's house in Ellenville (663-664).

ARGUMENT

There Is No Merit To Appellants' Claims Of Reversible Error.

Appellants raise five claims of reversible error. Specifically, they assert that: (a) the district court gave an improper instruction early in the trial which withdrew certain elements of the offense from the jury's consideration; (b) the court erred in allowing an accomplice witness, without objection, to testify in his Air Force uniform; (c) a government chemist's testimony was improper; (d) the court erred in allowing certain co-conspirators' statements to be received in evidence; and (e) disparate sentences between appellant Korzeniewski and other co-defendants was violative of his Sixth Amendment right to trial. Each of these points, we contend, is frivolous.

A. The Alleged Improper Instruction

During the lengthy cross-examination of accomplice witness Robert Kuzniewski, the court held a side bar conference concerning the relevance of the cross-examination. At the side bar, counsel for the appellant Korzeniewski stated that his questions were designed, as he put it, "to show . . . the complete framework of the illegality . . ." (156). At this point, the court noted that "[t]here's no question about this. . . . The only question is was your man [Korzeniewski]—did he have any part in it? That's the case. That's it from here on" (156-157). Thereupon the court gave the following instruction:

As far as this scheme that they were involved in, there is no question that the whole scheme was illegal. No question about it. No one disputes it. I don't think anyone disputes it.

The question is whether these two gentlemen sitting here had anything to do with it. (A. 44).

There was no objection to the instruction. Indeed, both defense counsel stipulated that there was an illegal conspiracy, without conceding that the appellants were parties to it (157-159).⁵

⁵ The full stipulation by defense counsel was as follows:

Mr. Marks [Assistant U.S. Attorney]: With respect to the illegality of the scheme, your Honor, perhaps we can get a stipulation from counsel to that effect. The Government will stipulate the scheme was illegal.

The Court: No question about it.

Mr. Klenosky [Counsel for Korzeniewski]: No, I won't stipulate to that.

The Court: The question is whether they had anything to do with this matter in any respect whatsoever. If they didn't, then the jury knows what it must do.

All right.

Mr. Marks: Will counsel stipulate that the scheme was——

Mr. Klenosky: On the basis of the——

The Court: All right, we don't need any. On the face of it, it's illegal.

Mr. Gallagher: [Counsel for Miller]: I will be happy to stipulate that this witness's partnership——

The Court: Was illegal.

Mr. Gallagher: It was illegal, and his activities were illegal. But in no way do I intend to imply that my defendant had anything to do with it.

The Court: I just told the jury that.

Mr. Marks: Very good.

The Court: That's the question involved. If they had nothing to do with it, then you jurors know exactly what you must do. Because, as I instructed you——

Mr. Marks: Will you put your stipulation on the record.

Mr. Klenosky: Well, I am not prepared to dictate a stipulation into the record at this time.

The Court: No. He just wants to know, do you want to stipulate the scheme was illegal, without conceding your defendant had anything to do with it?

Mr. Klenosky: I will stipulate to that, yes.

The Court: Sure. (157-159).

Appellants now for the first time claim that the instruction was in error because it took essential elements of the offense from the jury's consideration. There simply is no merit to the argument.

There was no objection to the instruction at trial, and its contents were stipulated to. Accordingly, the point is not available on this appeal. *United States v. Martinez-Carcano*, Dkt. No. 77-1041, Slip op. 4325, 4329 (2d Cir. June 21, 1977). In any event, it was an accurate statement of the appellants' theory of the case, and it did not withdraw any element of the crime from the jury's deliberation. For example, in his opening statement, appellant Korzeniewski's attorney conceded that "there was a vast conspiracy . . . there is no question about it" (19). Moreover, in their summations, both counsel made similar concessions that Kuzniewski and Palminteri were engaged in an illegal conspiracy while denying that appellants were involved (703, 711, 727). Accordingly, the instruction was appropriate and there is no merit to appellants' claim. Cf. *United States v. Alfonso-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976).

B. The Air Force Uniform

Appellants argue that the district court erred by permitting Kuzniewski, an accomplice witness called by the prosecution, to testify in his Air Force uniform. They assert that the uniform improperly bolstered Kuzniewski's credibility by showing that he was a member of the armed forces. There was, however, no objection to Kuzniewski's wearing his uniform at trial, and the point is raised for the first time on appeal.

The complete answer to appellants' argument is that there was no objection at trial and, accordingly, the point is waived. See, *Estelle v. Williams*, 424 U.S. 501 (1976). There, the defendant stood trial in prison garb,

but since there was no objection, the Supreme Court held that the point was waived. *A fortiori*, the failure to object to the wearing of a military uniform by an accomplice witness must similarly constitute a waiver. To the extent that any prejudice flowed from Kuzniewski's wearing his uniform, it was of a substantially lower order than the prejudice arising from a defendant's standing trial in prison garb. If appellants had objected at trial, the court might easily have taken action to dispel any unfair inferences now complained of on appeal. See, *United States v. Nemes*, Dkt. No. 76-1584, Slip op. 3509 (2d Cir. May 16, 1977). But appellants failed to object below; accordingly, they have waived the right to raise this as an issue on appeal.

Apart from the failure to object, appellants' claim lacks any merit. No case is cited which holds that it is error for a witness to testify while dressed in his occupational uniform. The only case which appellants cite in support of their argument is *La Rocca v. Lane*, 37 N.Y. 2d 575 (1975), which is wholly inapposite. *La Rocca* dealt with the issue of whether a defense attorney had a First Amendment right to wear clerical garb while trying a case. The New York Court of Appeals held that that right did not encompass the wearing of clerical garb by a lawyer-cleric, since the effect of such attire might be to bolster an attorney's credibility and arouse sympathy for his client. Here, however, there is no similar danger. Regardless of the status that a juror might attribute to a member of the military service, in this case the witness had admitted and, indeed, plead guilty to participating in the crime charged.⁶ It is, therefore, hardly likely that the mere wearing of the uniform would have affected the jury's assessment of Kuzniewski's testimony, particularly

⁶ Underlying appellants' argument is the dubious assumption that the jury would have given greater credence to the testimony of a military man than that of a civilian.

in light of the district court's charge that, as an accomplice witness, Kuzniewski's testimony must be received "with caution and [be] weigh[ed] with great care before you accept it" (770-771). Accordingly, there was no error in permitting Kuzniewski to testify in his military uniform.

C. The Chemist's Testimony

Appellants also contend that the district court erred in permitting a government chemist to testify that Kuzniewski, an accomplice in the "angel dust" enterprise, knew how to synthesize PCP.

The chemist, Jack Fasanello of the Drug Enforcement Administration, was asked a hypothetical question based on Kuzniewski's testimony (491-493). The question restated Kuzniewski's description at trial of the procedures that he followed in order to synthesize phencyclidine. In answer to this hypothetical question, Fasanello testified that the synthesis of phencyclidine would result if the procedure described were followed (491-493). Fasanello also testified that, based on his own discussions with Kuzniewski, he was of the opinion that Kuzniewski had a good working knowledge of the synthesis of PCP (494).

Appellants argue that the chemist could properly testify only about the product itself, not about Kuzniewski's ability to synthesize the drug. This argument, however, misconceives the purpose of expert testimony. Expert testimony is admissible to assist the jury to "understand or to determine a fact in issue . . ." Fed. R. Evid. 702. Clearly, an issue in this case was whether Kuzniewski knew how to make the drug. Therefore, expert testimony was necessary for the jury to determine whether Kuzniewski had the ability to make PCP since this chemical process was certainly not within the scope of lay knowledge. Accordingly, the chemist's testimony based on the hypothetical question was unquestionably proper under Rule 702.

The additional testimony that it was the expert's opinion that Kuzniewski had the ability to synthesize was, we submit, cumulative of the response to the hypothetical question. The chemist had already testified in answer to the hypothetical question that Kuzniewski's methods would produce PCP (491-493). Since the answer demonstrated that Kuzniewski knew how to make PCP, the subsequent testimony concerning Kuzniewski's ability to do so was, therefore, hardly error or if error at all was, at worst, harmless.

D. The Co-conspirators' Statements

Appellants assert that the district court committed error in ruling that co-conspirators' statements made outside the presence of the appellants were admissible.

Appellants first argue, citing *United States v. Geany*, 417 F.2d 1116 (2d Cir. 1969), that the court erred by ruling before all the evidence had been presented that a conspiracy existed. *Geany*, however, does not stand for the proposition that a ruling pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence must not be made until all the evidence is presented; rather, in *Geany*, the court held simply that on the facts of that case numerous pieces of evidence viewed "not in isolation but in conjunction" formed a proper basis for a finding that the defendant was a member of a conspiracy.

Appellants also argue that the district court erred by accepting the government's position that a conspiracy existed, thereby—so the argument goes—enhancing the credibility of the government's witnesses. Appellants' argument is based entirely on an inconsequential passing remark by the prosecutor in response to an objection to a question about a conversation between co-conspirators. The assistant stated: "We have a conspiracy already"

and the court replied, "I understand that. Proceed" (188). That statement, viewed in the context of the entire trial, surely does not rise to the level of reversible error. This is especially so since it was conceded that there was a conspiracy. Moreover, the court later properly charged the jury with respect to the co-conspirators' statements (758). We submit that any prejudicial effect of this remark was cured by the court's instructions. In addition, we note that there was no objection to the prosecutor's remark.

Appellants further contend that the court failed to apply a "discriminatory analysis which could have resulted in limiting instructions" (Brief at 9-10). But appellants did not request a limiting instruction at trial. Thus, they are barred from raising this "issue" on appeal. See, *United States v. Martinez-Carcano*, Dkt. No. 77-1041, Slip op. 4325 (2d Cir., June 21, 1977).

Finally, appellants seem to argue that there was insufficient evidence to sustain a finding that appellants were members of the conspiracy. That argument, as a brief review of the facts shows, is without merit.

During the summer of 1975, Kuzniewski entered into a partnership with Marek Janusz and Joseph Palminteri for the purpose of producing and selling "angel dust" (35-36). In July of that year, Kuzniewski showed Miller, who had one pound of PCP, how to pour the substance on mint leaves (37-39). Sometime later, Kuzniewski saw Miller with five or six ounces of PCP and a double-beam scale in the back of his car (40). Around November 1975, Kuzniewski asked Korzeniewski when he could expect payment for some "angel dust" which Kuzniewski and his partners had given to Miller (42). Korzeniewski said that Kuzniewski would be paid in a week or two (42, 44). Later, in November or December 1975, Korzeniewski admitted that a "whole bunch of little kids

[were] dealing" angel dust for him (45). Miller said that Robert Higgins was dealing "nickel bags" for him (46). In addition, Miller paid Kuzniewski a total of \$350 for PCP on two occasions (46-47). In December 1975, Palminteri agreed to sell a quantity of PCP to Miller (181-185). Korzeniewski paid Palminteri between \$200 and \$300 for the PCP that he and Miller had bought (217, 224-225). Thus, there was ample evidence to support the court's finding that appellants were members of the conspiracy.

E. The Sentence

Appellant Korzeniewski contends that the imposition of a sentence more severe than that imposed on the individuals who plead guilty and cooperated with the government violated his Sixth Amendment right to trial. Appellants' sentences were well within the maximum of five years. 21 U.S.C. §§ 846 and 841(b). As this Court has recently said, "[s]entences imposed within the statutory maximum are not reviewable in this Circuit, absent the possibility that the sentence was based on material misinformation or misunderstanding concerning a defendant." *United States v. Mejias*, Dkt. Nos. 76-1384, 76-1389, 76-1395, Slip op. 2269, 2292 (2d Cir. March 10, 1977). See also, *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976). Accordingly, appellant's argument is frivolous.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
July 15, 1977

Respectfully submitted,

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Of Counsel.**

* The United States Attorney's Office wishes to express its appreciation to Scott Himes, a third year student at Hofstra University School of Law, for his assistance in the preparation of this brief.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 20th day of July 19 77 he served a copy of the within
Brief For The Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Rudolph M. Klenosky, 671 Manhattan Av. Bklyn, N.Y. 11222

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Manhattan Borough~~, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this

20th day of July 19 77

Carolyn M. Johnson

NOT

No. 41-4518278
Qualified in Queens County
Term Expires March 30, 1979